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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request For Amendment of the)
Commission's Rules to)
Preempt State and Local)
Regulation of Tower Siting)
for the Commercial Mobile)
Radio Services)

RM No. 85

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To: The Commission

COMMENTS IN SUPPORT OF INITIATION OF RULEMAKING

Paging Network, Inc. ("PageNet"), through its attorneys and pursuant to 47 U.S.C. § 1.401, hereby submits its comments in support of the initiation of a rulemaking to preempt state and local regulation of antenna sites. In support of these Comments, the following is respectfully shown.

I. Statement Of Interest

PageNet is the largest and most rapidly expanding paging company in the United States. At present, PageNet provides both private and common carrier services to over 4 million units and continues to expand its existing paging systems while establishing new paging systems in new markets. PageNet is also the licensee of three (3) nationwide narrowband PCS channels over which PageNet intends to offer VoiceNow™, its advanced paging service, which allows subscribers to receive voice messages in their pager. To build-out these nationwide PCS systems, PageNet will be constructing 100 antenna sites a month. Therefore, the issue of antenna siting is critical to PageNet's

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ability to rapidly construct its PCS systems and provide service to the public.

II. Wireless Communication Providers Require Access To Antenna Sites Without Layers Of Local And State Regulation

It is the stated policy of the United States to vigorously pursue the creation and implementation of the information superhighway. In 1994, the Commission took herculean steps to authorize and hold auctions for the new personal communications services ("PCS"), which are the wireless components of the information superhighway. Unfortunately, even though Congress preempted in large part state regulation of the commercial mobile radio services ("CMRS")¹, one aspect of CMRS that Congress did not expressly preempt was state and local regulation of antenna siting. Since the acquisition of antenna sites will be vital to the rapid construction of the communication systems that will bring the information superhighway to the homes, offices, and vehicles of millions of Americans, the challenge for the Commission is to preserve the ability of CMRS carriers² to efficiently acquire, build and operate, antenna sites without redundant, conflicting, or burdensome layers of federal, state and local regulation.

In the context of a rulemaking to preempt state and local regulation of antenna siting, PageNet believes that it would be valuable if the Commission considered some level of

¹ Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c) of the Communications Act.

² The term "CMRS," as used in these Comments, includes Private Carrier Paging.

federal preemption in regard to: (1) hazards to aircraft navigation; (2) radiofrequency radiation; and (3) aesthetics. State and local regulations regarding hazards to aircraft navigation and radiofrequency radiation should be totally preempted at the state level. PageNet believes that the Commission should also consider preemption of state and local authorities seeking to prevent antenna placement for reasons of aesthetics. Specifically, the Commission should consider what standards would serve to properly balance the needs of those customers that require high quality wireless services with maximum geographic coverage and throughput against possible local interests in preventing the erection of additional transmission facilities.

1. Antenna Siting Regulation On The Grounds Of Hazard To Aircraft Navigation By State And Local Authorities Should Be Preempted

In initiating a rulemaking regarding state and local regulation of antenna siting, the Commission should seek comment on whether state and local authorities should be allowed to regulate any aspect of antenna towers or antenna sites from the standpoint of hazard to aircraft navigation. PageNet believes that this aspect of antenna site regulation is vested solely at the federal level. Specifically, the Federal Aviation Administration ("FAA") and the FCC share the task of regulating antenna structures with respect to hazard to air navigation. The FAA and the FCC have specific guidelines³ for the painting and lighting of antenna structures and the FCC actively enforces its

³ See e.g., 47 C.F.R. § 17 et seq.

painting and tower lighting regulations. Furthermore, the FCC has proposed to extend its regulation over tower structure owners with a greater emphasis on the tower owner's responsibility to comply with the regulations of the FAA and the FCC.⁴ Since the field of antenna structure regulation in regard to hazard to air navigation is completely occupied at the federal level, and to prevent local regulation that is redundant with federal regulation, the FCC should preempt all state and local regulation of antenna siting as such regulation would relate to concerns regarding hazards to aircraft navigation.

2. State And Local Regulation Of Antenna Siting With Respect To Radiofrequency Radiation Should Be Preempted

Radiofrequency radiation is an aspect of regulation that must be considered in a rulemaking regarding the preemption of state and local regulation of antenna siting. Speculative concerns regarding radiofrequency radiation have caused many local authorities to restrict the placement of antennas. These restrictions are costly to the construction of viable CMRS systems because alternative sites must be found, and often sites are simply unavailable. In addition, with respect to the construction of CMRS systems, particularly broadband and narrowband PCS systems, rapid access to multiple antenna sites will be needed to timely construct systems capable of high

⁴ *Revision of Part 17 of the Commission's Rules*, GEN Docket No. 95-5.

quality service.⁵ Without these sites, CMRS carriers will simply not be able to construct systems with adequate throughput resulting in diminished service quality and offerings to customers.

In addition to the absolute necessity of rapid access to antenna sites, the Commission should preempt state and local regulation of radiofrequency radiation because the Commission already regulates radiofrequency radiation. Section 1.1307 of the Commission's Rules establishes radiofrequency radiation safety standards that must be followed by all CMRS providers. Furthermore, because the potential for radiofrequency radiation is greatly reduced with the relatively low power devices utilized in the land mobile services, the Commission has previously acted to categorically exclude land mobile services from routine radiofrequency evaluation.⁶ Therefore, to prevent state and local authorities from grafting layers of redundant, conflicting, or burdensome regulation onto CMRS carriers, the Commission should preempt state and local regulation regarding radiofrequency radiation resulting from CMRS operations.

⁵ As noted above, PageNet estimates that build-out of its nationwide VoiceNow™ service will require access to approximately 100 new sites per month. PageNet is only one of several nationwide narrowband PCS licensees that require antenna sites. Furthermore, in addition to the site needs of nationwide narrowband PCS, hundreds of other narrowband and broadband PCS carriers will all require a large number of sites to build-out their systems and provide service to the public.

⁶ See *Radiofrequency Radiation (Environmental Assessments)*, 2 FCC Rcd 2064, 62 RR2d 1086 (1987).

3. Local Aesthetics Require A Balanced Preemption Approach

In a rulemaking proceeding evaluating whether to preempt state and local regulation of antenna siting, the Commission should seek comment on how the construction of CMRS systems could be advanced without delay, while at the same time balancing the concerns of local residents. In this context, at a minimum, the Commission should propose that any antenna that is mounted on an existing structure, and is no more than twenty feet to tip above the existing structure, should not be subject to any state and local regulation. This level of preemption alone would be greatly beneficial to CMRS carriers and would allow for the rapid build-out of portions of CMRS systems. In addition, in areas in which the local authority cannot expect to be reasonably concerned regarding aesthetics, e.g., industrial areas, locations along major roadways, office buildings, water towers, etc., local authorities should not be permitted to delay the placement of antennas through needless regulation.

III. Conclusion

It is vital that the Commission initiate a rulemaking to determine at what level preemption of state and local regulation is necessary for antenna siting. PageNet believes that there are certain aspects of antenna and tower regulation, such as hazard to aircraft and radiofrequency radiation, that must be fully preempted in order to construct the PCS systems that the FCC is auctioning for construction of the information superhighway. Without such preemption, the wireless components of that highway will be delivered very late, if at all, and will


be much more costly. In addition, the Commission should preempt state and local regulation of antenna siting, if the placement of an antenna is on an existing structure and the antenna height to tip does not extend more than twenty feet above the existing structure. Finally, the Commission should evaluate whether greater preemption is necessary in order to maximize the rapid and efficient provision of wireless service to the public.

WHEREFORE, for all of the foregoing reasons, PageNet supports the initiation of a rulemaking in order to consider preemption of state and local regulation regarding antenna siting.

Respectfully submitted,

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February 17, 1995


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